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Supreme Court of the United States

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No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES, INCORPORATED,
Petitioners,

v.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Respondents.

On Certiorari to the United States Court of Appeals For the Second Circuit

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JURISDICTION

The judgment of the Court of Appeals (A. xliv), reversing in part and affirming in part the judgment of the District Court (A. 143a-145a), was entered on March 8, 1973. Respondents Teleprompter Corporation and Conley Electronics Corporation (hereinafter "Teleprompter") filed a Petition for Certiorari on June 1, 1973. On June 5, 1973, petitioners Columbia Broadcasting System, Inc. (hereinafter "CBS"), Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures Incorporated (hereinafter "Petitioners") filed a Conditional Cross-Petition for Certiorari with respect to the issues as to which the Court of Appeals had affirmed the judgment of the District Court. Both petitions were granted on October 9, 1973.[2] The jurisdiction of this Court was invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in holding that the unauthorized retransmission of Petitioners' copyrighted works by Teleprompter's cable television stations was not an infringement of the copyrights of those works in violation of Section 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. § 1(c) and (d), when the said cable stations performed all or some of the functions described below:

(a) origination of programming;

(b) sale of commercials for transmission over their cable television stations;

(c) interconnection with other cable television stations to form a cable television network.

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[2]The Question Presented in No. 72-1628 is whether the Court of Appeals erred in imposing copyright liability on Teleprompter for importing distant signals. Petitioners and Teleprompter are filing separate briefs with respect to each petition, since the parties were unable to agree that each would present a single consolidated brief covering all issues.

STATUTE INVOLVED

Section 1(c) and (d) of the Copyright Act, 17 U. S. C. § 1(c) and (d), provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) to deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever * * * and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever * * *."

STATEMENT

A. Prior Proceedings Herein

This is an action for copyright infringement commenced on December 11, 1964 and supplemented by complaints filed on December 15, 1969 and May 17, 1971 (A. 1a-28a, 50a-59a, 87a-93a).

Petitioners Calvada Productions, Jack Chertok Television, Inc. and Dena Pictures, Incorporated are independent creators and producers of television programs which are protected by statutory copyright. Petitioner CBS is also a creator and producer of television programs protected by statutory copyright.[3]

The copyrighted programs here at issue were initially licensed for transmission by the CBS Television Network, a Division of CBS, to its affiliated television stations for simultaneous broadcast by those stations to viewers in their service area ("network programs"). Some of the copyrighted works described in the complaints were subsequently "syndicated", *i.e.* licensed by the copyright owners or their licensed distributors to individual television stations for further broadcast to viewers in their service areas.

Teleprompter is the nation's largest operator of cable television stations. At the time of trial, it owned and operated some 100 cable television stations throughout the country with more than 500,000 paying subscribers.[4] The

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[3]Petitioner CBS also operates a television network and owns various television stations. Like the three other petitioners, who are representative of numerous producers of television programming, however, CBS has sued solely in its capacity as the copyright proprietor of some of the programs here at issue.

[4]Teleprompter cable systems are presently serving some 780,000 subscribers. *Broadcasting*, April 30, 1973 at p. 56 (Citing Teleprompter Corp.'s first quarter report for 1973). The Department of Commerce in its U. S. INDUSTRIAL OUTLOOK 1974 (Oct. 1973) at p. 288 predicts that at the end of 1973 cable television will have some 8.2 million subscribers nationally.

complaints alleged that the Teleprompter cable television stations had intercepted the signals of television stations broadcasting Petitioners' copyrighted works and then retransmitted both the network and syndicated programs to their paying subscribers, without authorization or license, thereby infringing Petitioners' copyrights.

At the time of the filing of the original complaint herein there was pending in the United States District Court for the Southern District of New York the case of *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S. D. N. Y. 1966), *aff'd*, 377 F. 2d 872 (2d Cir. 1967), *rev'd*, 392 U. S. 390 (1968) (hereinafter *"Fortnightly"*). *Fortnightly* was a case of first impression designed to test the copyright liability of traditional CATV systems, the function of which was to merely enhance the reception by television viewers of the signals of nearby television stations. Petitioners herein were not parties to that action.

The District Court in *Fortnightly* found that the CATV systems described therein infringed the copyrights at issue, basing its decision in large part upon its analysis of the technical and engineering aspects of the defendants' systems. 392 U. S. at 399 n. 27. On appeal, the Second Circuit unanimously affirmed the finding of infringement, basing its decision largely on the quantitative contributions which the Fortnightly systems made to bring about the viewing of the copyrighted works. *Id.* at 396-397.[5]

This Court reversed, holding *inter alia* that the issue of copyright infringement depended upon "a determination of the function" that a particular cable television system plays "in the total process of television broadcasting and reception." *Id.* at 397. This Court characterized Fortnightly's overall function as that of a mere reception service

[5]While *Fortnightly* was on appeal, counsel for the parties in this case voluntarily stayed proceedings herein in order to avoid an unnecessary burden on the courts.

—a "passive beneficiary"—and determined that the Fortnightly CATV systems were "on the viewer's side of the line" and thus did not infringe. *Id.* at 399.[6]

After *Fortnightly*, pre-trial proceedings resumed in this case. The bulk of the basic facts pertaining to the function of the Teleprompter systems was stipulated by the parties (A. 148a-291a). These stipulations established that the Teleprompter cable television stations performed significant functions which were not performed by the Fortnightly systems.

The courts below found that the Teleprompter cable television stations selected and imported for retransmission programs broadcast in the first instance by television stations in markets far distant from and in no way related to the communities in which defendants' cable television stations operated, originated substantial programming, sold advertising, interconnected with other cable television stations, and transmitted television signals over-the-air. These functions—traditionally functions of broadcasters—were in addition to a so-called "reception service" which in some areas enhanced the ability of subscribers to receive the available broadcast signals of television stations in local and adjacent markets (A. xx-xxv, xxx, xxxi, 111a-121a). The courts below also found that the various services offered by the Teleprompter stations were "sold as a package," and that no one of their services was available independent of the others (A. xxviii, 121a, 135a).

On the basis of these facts, Petitioners contended that the Teleprompter cable television stations did not function as mere passive beneficiaries. Rather, Petitioners contended that cable stations performing some or all of the interrelated functions involved were fully and functionally equivalent to "broadcasters" and, accordingly, could not consistently with the *Fortnightly* test be deemed to fall "on

[6]For a more detailed discussion of *Fortnightly* see *infra* at 15-19.

the viewer's side of the line" for purposes of copyright liability.

B. Decisions Below

The District Court agreed that *Fortnightly* was not dispositive of the issues before it. The court noted that "[p]rogress in the CATV industry" and certain novel and "specific differences between defendants' CATVs and those in *Fortnightly*" made this case "the inevitable sequel to [*Fortnightly*]." (A. 105a). But notwithstanding this conclusion, the District Court held that it was bound by *Fortnightly* to dismiss the complaints (A. 137a-139a), thus granting the entire cable television industry copyright immunity by judicial fiat.

The Court of Appeals also recognized that the operations of the cable stations in this case were "different and broader" than those before this Court in *Fortnightly* (A. at xxvi). And in an unanimous opinion, the Second Circuit set forth the issue before it as:

> "whether the character of CATV is so changed by additional services that the cable systems here have undertaken that their *total operation,* including the reception service, under the *Fortnightly* functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to 'perform' the broadcast programming that they distribute." (A. at xxvii) (emphasis added).

Having thus initially formulated the issue as an analysis of the "total operation" of the Teleprompter cable stations, the Court of Appeals, however, considered only "the effect of *each* of these operations on the application of the *Fortnightly* doctrine to the CATV systems involved." (A. at xxvii) (emphasis added). As a result, the court never ap-

plied the test properly and fully since it measured each Teleprompter innovation in isolation from the other innovations.

This function by function analysis led the Court of Appeals to reverse the judgment of the District Court with respect to Teleprompter's activities in selecting, importing and distributing television signals located in some cases hundreds of miles from the communities served by its cable television stations, functions admittedly not before the Supreme Court in *Fortnightly*.[7] The Second Circuit held that cable television stations to the extent that they import such "distant" signals are "functionally equivalent to a broadcaster and thus * * * 'perform' the programming distributed to subscribers on these imported signals" within the meaning of *Fortnightly* and of the Copyright Act (A. xxxiii).[8]

At the same time, the Court of Appeals concluded that, when considered without relation to each other, neither origination of programming, sale of commercials nor interconnection into cable television station networks—admittedly functions not present in *Fortnightly*—should impose copyright liability on the Teleprompter cable television stations (A. xxvii-xxxi).[9] At no time, however did the court below consider the effect of the *overall* operation of the Teleprompter cable television stations as functioning entities. This refusal to consider whether such *overall*

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[7]Cable system counsel in *Fortnightly*, who represent Teleprompter here, stated in a brief to this Court that the systems involved in *Fortnightly* were "in the service area" of the transmitting stations and that the importation of programs from distant markets was "not involved in this [*Fortnightly*] case." Petitioners' Reply Brief, March 5, 1968, pp. 1-2.

[8]Petitioners will present a fuller analysis of the Second Circuit's approach to the distant signal question in their answering brief in No. 72-1628.

[9]With respect to the use of microwave to transmit various signals to and within a cable system, the Court of Appeals held that such does not in and of itself make the cable system functionally equivalent to a broadcaster (A. xxxi-xxxii).

operation put them on the broadcaster's "side of the line" resulted in an erroneous application of the *Fortnightly* functional test.

C. The Pertinent Facts

To simplify resolution of the basic legal issues, Petitioners elected to sue only on an illustrative group of copyright works, some created by independent producers and licensed to CBS and some created by CBS itself. Certain of the examples chosen were of programs infringed during their initial network "runs" and others during their syndication.[10] For purposes of trial it was stipulated that the copyrights were valid (A. 72a).

While the complaints clearly alleged infringement by *all* of the Teleprompter cable television stations which received and retransmitted Petitioners' copyrighted works, Petitioners sought to expedite the trial by primarily limiting their proof to five specific and illustrative Teleprompter stations located in New York (New York), Great Falls (Montana), Farmington (New Mexico), Rawlins (Wyoming), and Elmira (New York).[11] These five were chosen by Petitioners as presenting for judicial consideration a representative mixture of the functions performed by modern cable television stations in the various combinations in which they then appeared in the industry and were rec-

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[10]Network programs involved include three programs created, copyrighted and distributed by CBS itself (A. 4a-9a). They also include programs licensed for network distribution by CBS from independent producers—petitioners Calvada, Chertok and Dena—who created and copyrighted the programs (A. 9a-13a, 15a-19a, 21a-24a). Two other network programs involved were created and copyrighted by a non-party to this action, which assigned all its rights in the programs to CBS which then distributed them (A. 50a-52a, 87a-89a). Three programs involved in this action were in syndication at the time of alleged infringement (A. 52a-56a, 89a-93a).

[11]The facts with respect to the Elmira station will be dealt with in Petitioners' Answering Brief in No. 72-1628.

The Great Falls cable station also originated for transmission over another of its channels some ten hours per week of programming typical of a small-market broadcast television station. Printed messages, as well as time and weather information, were also being cablecast throughout the day. The Great Falls cable station has been interconnected with other cable stations of Teleprompter and others into a nation-wide network (A. 258a-259a).

3. Teleprompter's Farmington, New Mexico, Cable Television Station (described per stipulation at A. 184a-204a, 266a-275a) (see A. xxi-xxii).

Initially, the Farmington cable television station imported the programs of four television stations located in Albuquerque, New Mexico, 150 miles away. These signals were picked-up off-the-air at a point 30 miles from Farmington and then microwaved into Farmington, as later were those of a Durango, Colorado television station. Direct reception of the Albuquerque stations was impossible in Farmington because of the distances involved; direct reception of the Durango station was impossible because of the nature of the intervening terrain.[15]

The Farmington Teleprompter cable station later chose to bring to Farmington the programs of four Los Angeles independent (non-network) stations. Teleprompter intercepted the signals embodying these programs near Los Angeles and retransmitted them to Farmington, over 600 air-miles away, by means of an intricate microwave link-up extending some 1,300 miles. These programs were otherwise not available in Farmington because of the distances involved.

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[15]Some of these stations were available to Farmington residents by virtue of "translators". The significance of this and the Second Circuit's treatment of the translator issue will be discussed in our Answering Brief in No. 72-1628.

The Farmington cable television station has also been originating its own programming for transmission over one of its cable channels. The amount of such programming has varied from 15 to 42 hours per week and is of a nature typical of programming originated by a traditional television broadcaster. Another channel was used for full-time weather and time information. Printed messages were also distributed over local origination channels. The Farmington cable station has been interconnected with other cable television stations of Teleprompter and others into a nationwide network (A. 258a-259a).

4. Teleprompter's Rawlins, Wyoming, Cable Television Station (described per stipulation at A. 234a-245a) (see A. xxiii).

The Rawlins cable television station imported over an elaborate microwave system the programs of five television stations from Denver, 184 miles away. The signals of these five stations were not available in Rawlins off-the-air because of the great distance involved. In addition, the cable station imported the signals of the Casper, Wyoming station, 87 miles away, direct reception of which was not feasible in Rawlins due to distance and terrain.

The cable station was originating 10 hours a week of programming typical of that originated by traditional television broadcasters, as well as full-time weather and time information.

SUMMARY OF ARGUMENT

Fundamental to the issues of this case are the rights of the copyright owners. In *Fortnightly* this Court passed on the copyright liability of a "community antenna" which merely "enhanced" the broadcast television signals already available in the air over a community. In this case, the Court is presented with the issue of whether copyright immunity should be expanded to cover the newly devel-

oped cable television industry, an industry that is rapidly becoming indistinguishable from the broadcasting industry, while leaving the directly competing broadcasting industry with no such immunity.

This Court in *Fortnightly* granted a limited immunity from copyright liability. It should not be extended to cable television stations which are functionally equivalent to broadcasters. Television and cable television are increasingly in competition today and cable television is growing rapidly. Under the decision below cable television may borrow and use at will locally broadcast programs of the television stations, despite the fact that the cable television stations are simultaneously performing the functions of a "broadcaster." On the other hand, nobody has suggested that competition be equalized by extending to broadcast television stations the privilege of free borrowing and usage of cable programs. Cable television interests certainly would protest loudly and properly if any television station, by subscribing to cable television, received and retransmitted such programs.

The court below, in its analysis, ignored the importance of the origination of programs, the sale of commercials and the interconnection of cable stations.[16] It ignored the interrelationship of these functions with Teleprompter's retransmission of broadcast television signals. It disregarded the competitive position of cable television in the television industry as a whole and the economic impact of its holding on copyright owners.

Under the *Fortnightly* rule correctly applied, modern cable television stations performing the additional functions described herein are entitled to *no* copyright immunity, just as broadcast television affiliate stations which perform these same functions are entitled to no copyright immunity.

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[16]Petitioners in their answering brief in No. 72-1628 will demonstrate that the Court of Appeals was correct in its determination with regard to the retransmission of distant signals.

ARGUMENT

I

THE *FORTNIGHTLY* CASE ESTABLISHED ONLY A LIMITED COPYRIGHT IMMUNITY

The cable television industry in this country is only some 20 years old. As initially conceived, a CATV functioned merely as a well-located antenna to improve fringe reception of nearby television stations. This was the type of cable system involved in *Fortnightly*, 392 U. S. at 399 (A. 298a-299a, 372a-373a, 593a, E-62, E-74, E-136).

The two Fortnightly systems (located in Clarkburg and Fairmont, West Virginia) consisted merely of receiving antennas and cable connecting the antennas and headend to the subscribers. Each of the systems only carried the programs of five television stations located in communities adjacent to the cable communities. The distances between the cities from which the broadcast signals originated and the two cable communities varied between 52 and 82 miles.[17] 392 U. S. at 392. If it had not been for the hilly terrain in and around Clarksburg and Fairmont, these signals would have been satisfactorily receivable by all residents in the community. See *id.* at 391, and 337 F. 2d at 875. Indeed, some residents did in fact receive them.[18]

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[17]Due to the physical nature of television signals, which travel in a straight line and do not follow the curve of the earth's surface, the range of reception of such signals is limited, the average signal traveling only about 60-90 miles from the transmitting antenna, assuming that there are no terrain barriers such as mountains or hills to cut down on this range (A. 317a-318a, 374a, 492a-493a). The physical limitations on the range of television signals will be discussed in greater detail in Petitioner's Answering Brief in No. 72-1628.

[18]As the Court of Appeals found in *Fortnightly*, Fortnightly's engineering expert testified that "some 10 to 15 percent of the locations in and around Fairmont, and 1 to 5 percent in Clarksburg * * * receive[d] satisfactory signals from the stations in suit by rooftop antennas and there was general unparticularized testimony that rooftop antennas were erected and produced satisfactory pictures at a relatively small number of favored locations." 377 F. 2d at 883-884 n. 14.

To provide satisfactory reception of these nearby signals for their subscribers, an antenna was erected by Fortnightly on a hilltop near the center of each of those two towns. These antennas picked up the broadcasts of the stations involved directly off-the-air and transmitted them by cable to the paying subscribers. *Id.* at 874-875. The two systems, in other words, provided nothing more than a "well-located antenna with an efficient connection to the viewer's television set." 392 U. S. at 399 (footnote omitted).[19]

It was in light of these facts that this Court set out to determine whether or not the Fortnightly CATV systems "performed," within the meaning of § 1(c) and (d) of the Copyright Act, the programs of the five television stations whose signals they retransmitted. And it was on the basis of these limited facts that this Court held that the Fortnightly CATV systems did not perform those programs.

Amici informed this Court at the time that certain cable stations performed functions far different than those performed by *Fortnightly*. But as urged by Fortnightly counsel,[20] this Court clearly limited its decision to the par-

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[19]Some residents in the two communities, on the other hand, decided not to make use of the Fortnightly facilities and chose to erect cooperative antennas at some convenient location to alleviate their particular problems in the reception of the five stations. 392 U. S. at 391-2. Such cooperative antennas provided essentially the identical services provided by the Fortnightly community antennas.

[20]Fortnightly's counsel (who also represent Teleprompter here) stated that this Court's decision "must necessarily rest on the facts concerning *the operation of petitioner's community antenna television systems and not to possible or theoretical operations of some CATV system in the future.*" Petitioner's Reply Brief, March 5, 1968, pp. 1-2 (emphasis added).

Cable system counsel there also emphasized that the systems in *Fortnightly* were *"in the service area"* of the transmitting stations and that the importation of signals from distant markets via microwave was "not involved in this case." *Id.* pp. 2-3 (emphasis added). Before the Court of Appeals it was represented that the CATV systems in *Fortnightly*, "unlike a broadcasting station, do not originate programs or advertising***." Brief for Defendant-Appellant to the Court of Appeals, dated November 9, 1966, p. 4.

ticular cable systems before it and refused to consider whether copyright immunity should also be extended to cable stations which imported distant signals, originated programming, sold commercials or performed other non-reception functions. Thus, in a footnote at the very beginning of its opinion, this Court observed: "Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion." 392 U. S. at 392 n. 6. Further, the Court noted that "While we speak in this opinion generally of CATV, we *necessarily* do so with reference to the facts of this case." *Id.* at 399 n. 25 (emphasis added).

This Court in *Fortnightly* sought to establish a test for "performance" in the "light of drastic technological change" that had occurred since the enactment of the Copyright Act in 1909. *Id.* at 395-396. This test was based squarely on an analogy.

Traditionally, the producer of a stage show "performs" within the meaning of the Copyright Act, but the "viewer" does not. Likewise, when a motion picture is shown in a theater, the exhibitor, but not the viewer, "performs". *Id.* at 398.

Analogizing these situations to the functions of a traditional "broadcaster" as contrasted to those of a television "viewer," this Court observed:

> "The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors,

and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary." *Id.* at 398-9 (footnotes omitted).[21]

Upon review of these historic modes of "performance," the Court stated that the resolution of the issue of whether or not the defendants "performed" depended "upon a determination of the *function that CATV plays in the total process* of television broadcasting and reception," *id.* at 397 (emphasis added); where a CATV considered "in this framework* * * falls on the viewer's side of the line" it does not "perform." *Id.* at 399. The distinction rests upon a determination of whether the cable system is more akin to an "active performer" or to a "passive beneficiary."

A "broadcaster" according to the Court: (i) *"selects* and *procures* the program to be viewed, [which he] may produce * * * himself, whether 'live' or with film or tape, or he may *obtain* * * * *from a network or some other source"*; (ii) converts the images and sounds into electronic signals and transmits them to the public, unless of course

[21]This Court clearly intended to include broadcasts of materials furnished by others—a recorded program obtained from a syndicator or a network program from the central studios—as performances. Even if the statement in the text that "Broadcasters perform" left any doubt of this, the footnote to that statement would completely remove it:

> *"Jerome H. Remick & Co.* v. *American Automobile Accessories* Co., 5 F. 2d 411 (radio broadcast); *Associated Music Publishers* v. *Debs Memorial Radio Fund,* 141 F. 2d 852 (radio broadcast of recorded program); *Select Theatres Corp.* v. *Ronzoni Macaroni Co.,* 59 U. S. P. Q. 288 (S. D. N. Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to § 1(c) a special damages provision for 'infringement by broadcast.' 66 Stat. 752." 392 U. S. at 398 n. 23.

"the broadcaster obtains his program from a network [in which case] he receives the electronic signals directly or by means of telephone lines or microwave." *Id.* at 397; see *id.* at 400 (emphasis added). Viewers, on the other hand, merely "receive the broadcaster's signals." *Id.* at 401. A "broadcaster" is also engaged in the business of selling its time and facilities to sponsors and is concerned with program content and arrangement. *Id.* at 400 n. 28.

The Fortnightly systems, the Court found: (i) do not "select the programs to be viewed," they simply carry "whatever programs they receive"; (ii) do not "procure programs and propagate them to the public," they merely "receive programs that have been released to the public"; and (iii) have " 'nothing to do with sponsors, program content or arrangement,' " but only sell an " 'antenna service to *a segment of the public* for which [broadcasters'] *programs were intended* but which is not able because of location or topographical condition, to receive them without rebroadcast or other relay service by community antenna. . . .' " *Id.* at 400 (brackets in original emphasis added).

The Fortnightly systems, thus examined in light of these traditional functions of "broadcasters" and "viewers," were held by this Court to be merely "passive beneficiaries" in comparison with broadcasters. But at the same time, this Court clearly did *not* hold that only those entities that were "broadcasters" by technical Federal Communications Commission (herein "FCC") definition were liable for copyright infringement. Nor did it hold that all cable systems, regardless of the functions they perform, were television "viewers," mere "passive beneficiaries," or even "on the viewer's side of the line."

II

CABLE TELEVISION, HAVING UNDERGONE DRASTIC CHANGES SINCE 1960, CURRENTLY FUNCTIONS LIKE A BROADCASTER AND SHOULD BE SUBJECT UNDER THE *FORTNIGHTLY* TEST TO FULL COPYRIGHT LIABILITY FOR THE BROADCAST PROGRAMMING IT RETRANSMITS

The *Fortnightly* case was decided by this Court in 1968. The complaint in that case, however, was filed in 1960 and the factual record included even earlier material. Since 1960 the cable television industry has undergone a drastic change in function. The Teleprompter executives themselves carefully noted before the trial that the industry had undergone a "revolution," a "transformation in purpose, scope and expectation" (A. 582a, 584a, E-62). Accordingly, they regarded themselves as part of a "new industry" conveying "a great many types of services into the home" (E-62). They publicly stated that the terms "community antenna television," "CATV," even "cable television" were outmoded (A. 582a-583a, 594a-595a, E-136-137, E-149). They saw themselves as part of a "broadband communications" industry, a difference which they described as being one of basic "concepts," not just words (E-119).

The revolution which Teleprompter executives described was not a revolution in the development of new mechanical devices to improve television reception for persons living in mountain valleys or in rough terrain. Rather, the revolution was a dramatic change in function (see, *e.g.*, A. 582a-584a), with the modern cable stations, not merely acting as reception-aiding devices, but performing the same functions as "broadcasters" by deliberately selecting and importing distant signals, originating programs, selling commercials, connecting into networks, and transmitting television signals through the air. The significance of this change in

function for the future was dramatized by Teleprompter's claim that within a brief span of time "85% of our population will be receiving its television via cable" (A. 609a, E-35, E-57-58, E-139).[22]

Irving Kahn, then Teleprompter's Chief Executive Officer, characterized at trial these new operations of his company as "cable television stations" (A. 598a); and he was equally explicit in his pre-trial speeches.[23] In 1969, he conceded that there was "little resemblance" between the CATV system of "ten years ago," (*i.e.* of 1959, or one year before the complaint in *Fortnightly* was filed), and the modern cable station (A. 594a, E-77).

These many and various admissions against interest cannot be characterized, as respondents sought to do below,

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[22]As noted *supra* at 4n. 4, the Department of Commerce's latest report puts cable penetration at the end of 1973 at 8.2 million households.

[23]"But the new and valid concept is broadband communications—and that's as far removed from the community antenna concept as today's turbo-engine racing car is from Henry Ford's tin lizzie." (E-104).

"I am going to suggest that we discard the terms 'community antenna television' . . . 'cable TV' . . . and 'CATV'. . . ." "In our own company—and wherever else we have the opportunity—we encourage the substitution of *'Broadband communications'* for 'cable TV' or 'community antenna television'. This is an attempt to describe a system that uses more flexible tools of communication than coaxial cable alone—including, but not limited to, domestic satellites and short haul, or local distribution, microwave." (E-149).

"By way of definition, CATV started out as a reception device which became to be known as community antenna television because it brought TV signals to small communities over coaxial cable from a central antenna. We became more sophisticated, we added more channels, changed our name to cable TV and began to throw in a few additional frills—like weather information, news . . . even a few homemade local programs. . . .

"Now I suggest to you that the name 'cable TV' is outmoded, too. I suggest that we should forget about 'cable TV' and 'community antenna TV' and 'CATV' and think in terms of a new broadband communications medium that is emerging from CATV. That is where the future is—for you in advertising and marketing, as well as for us in CATV and other forms of communications." (E-136-137.)

as mere hyperbole, public relations words, catchy imagery and the like. Their accuracy is confirmed by a recent Justice Department filing with the FCC which states:

> "Community Antenna Television (CATV), the medium that the Commission set out to regulate more than six years ago, no longer exists. Cable Television has replaced it."[24]

Equally important are the repeated assertions by Teleprompter, and thus for this case its concessions, that its cable television stations are in direct competition with broadcast television stations (A. 590a-591a, 599a-600a, E-3-4, E-6, E-8, E-11, E-21, E-40, E-70-71, E-83-84).[25]

In summary, since the *Fortnightly* test for copyright liability is based upon the "function" that cable television stations play "in the total process of television broadcasting and reception," it is inescapable that the cable television industry, as the record herein demonstrates, is not the same industry, functionally, as that industry characterized by *Fortnightly* as being a "passive beneficiary" on "the viewer's side of the line." Rather, it must be recognized that the Teleprompter cable stations are as operating entities functionally equivalent to broadcasters (A. 298a-299a, 322a-323a, 326a-327a, 373a-379a, 400a-402a, 413a).

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[24]Comments of the Department of Justice Before the Federal Communications Commission, Docket No. 19554 at p. 15 (November 1, 1972).

[25]FCC regulations have already made applicable to cable television many of the rules traditionally applicable only to broadcasters. These include the rules governing equal time for political candidates (compare 47 U. S. C. § 315 and 47 C. F. R. 73.657 with *id.* § 74.1113), the "Fairness Doctrine, 29 Fed. Reg. 10415 (1964) and 47 C. F. R. § 73.679 with *id.* § 74.1115), lotteries (compare *id.* § 73.656 with *id.* § 74.1116), and identification of sponsors (compare *id.* § 73.654 with *id.* § 74.1119). Cable television systems which make a per-program charge for their services are subject to regulations like those placed on pay-TV (compare *id.* § 73.643(a), (b) with *id.* § 74.1121).

A. Each of the Teleprompter functions presently before the Court is a function traditionally performed by broadcasters.

Each of the new Teleprompter functions at issue in this case is a function traditionally performed by broadcasters. Indeed, these operations are the very same ones that this Court in *Fortnightly* identified as characteristic of a broadcaster: origination of programming, sale of commercials, interconnection into networks, and selection, procurement and distribution of programs to be viewed. See 392 U. S. at 397, 400; *supra* at 19.[26] None can be characterized as being identifiable with a "passive beneficiary" or "on the viewer's side of the line" within the meaning of *Fortnightly*.

1. Program Origination.

None of the primitive CATV systems involved in *Fortnightly* originated any programming. *Id.* at 392. In contrast, four of the five Teleprompter cable stations involved in this appeal originated programming. At the time of trial, seventy of the approximately one hundred Teleprompter cable stations also originated programming. (See Teleprompter Corp.'s First Annual Report on Program Origination to the FCC, Sept. 1971, at pp. 2, 28.)[27] Television "viewers"

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[26]As noted above, the relevance and impact of distant signal importation on copyright liability will be discussed in the separate brief to be filed in No. 72-1628.

[27]By October 1972, ninety-six Teleprompter stations were originating programming. Teleprompter Corp.'s Annual Report on Program Origination, October 1972, to the FCC, at p. 7.

Teleprompter has continually argued that it cannot be held accountable for its program origination activities because of an FCC order requiring non-automatic program origination by cable stations. This argument is misleading as well as being completely irrelevant to a case brought under the Copyright Act. In any event, the FCC order, codified as 47 C. F. R. § 76.201, applied only to cable stations with more than 3,500 subscribers. Presently only some 24% of cable systems satisfy the condition. TELEVISION FACTBOOK, Vol. 43, 1973-74. Furthermore, this rule is not presently and has never been in effect having been suspended by the Commission. See 36 Fed. Reg. 1086 (1971) and the opinion of the Court below. (A. xxx n. 13). Further, Teleprompter began its program origination for its own purposes long before the FCC promulgated its rule.

do not originate television programming—"broadcasters" and modern cable stations do.

In terms of the number of hours of locally originated programming, the Teleprompter New York City cable television station originated more programming than the average of the three large New York City network owned stations. Indeed, the New York station originated as many or more hours of local programming than any television affiliate in the United States (A. 454a-455a, E-250).[28]

The origination efforts of the Teleprompter cable television stations in Farmington, Great Falls, and Rawlins in terms of the number of hours and type of programming are the equivalent of the average local television station operating in the sixty smallest television markets in the country (A. 452a, E-242-249; *cf.* A. 375a-376a, 393a-395a).

It is not disputed that the type of programming originated by the Teleprompter cable stations is similar to and often precisely the same as that originated by broadcasters. Experienced broadcasters so testified at the trial (A. 376a-378a, 400a-401a) and the District Court so recognized (A. 113a). (See also A. 281a-284a, E-193-208.)

Teleprompter itself viewed those of its cable television stations that originated programs as functionally equivalent to broadcasters. The Teleprompter cable stations frequently referred to themselves as "stations" and even "networks." Like broadcasters, they maintained "studios," considered themselves "on-the-air" during origination periods, signed on and off at the beginning and end of the origination day, maintained program logs, and performed station identifications in the manner prescribed by FCC regulations for broadcasters (A. 528a-529a, 541a, 557a-558a, 598a, E-158-159, E-161-162, E-173, E-182-183, E-190, E-209, E-210,

[28]For a full description of the New York City station's current origination efforts, see *supra* at 10-11.

E-221, E-223, E-227, E-229, E-251). Further, by their own admission, they regarded themselves as competitive with broadcasters for audience support, programming material, and programming personnel (A. 559-561a, E-549, E-551, E-556-557, E-563-565).

The record shows that Teleprompter planned to play a "role of leadership" in the development of program origination in the cable television industry. In 1969 Teleprompter submitted to the FCC a five-year plan which called for doubling its volume of self-originated programming within the first year (A. 604a-650a, E-566, E-575). An independent producer of television programming was acquired for the purpose of developing programming (A. 602a, E-30, E-153-155, E-577, E-584-585). National headquarters personnel were used to produce programs for Teleprompter's own and other cable stations (A. 571a-574a, E-34).

In 1968 Teleprompter's chief executive officer stated that his industry had to decide *"whether we want to locally originate and be a station or whether we want to be a cable service"* (A. 578a-579a, E-54) (emphasis added). He subsequently stated that when his cable television stations originated programming, they would be "functioning in much the same manner as . . . radio and television industries have before us" (A. 602a-603a, E-96).

It was on the basis of these facts that experienced broadcasters testified at trial that the Teleprompter cable stations were functionally equivalent to broadcasters (A. 305a, 374a-375a, 379a-380a, 391a, 393a-395a, 399a-400a, 413a-414a). And it was on the basis of these facts that the District Court found that in originating programming, Teleprompter was plainly and simply functioning as a broadcaster (A. 135a).[29]

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[29]Subsequent to the opinion of the District Court, a majority of the Supreme Court in *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 667-670, 677, 680-681 (1972) (Brennan Opinion, Douglas Opinion) expressed the view that insofar as cable stations originate and distribute their own programs they are the equivalent of broadcasters.

2. The sale of commercials

In *Fortnightly* the Supreme Court singled out the sale of commercials as a characteristic of a business entity which fell "on the broadcaster's side of the line." 392 U. S. at 400 n. 28. The systems involved in *Fortnightly* did not sell commercials. However, the Teleprompter systems do sell commercials and the commercials they sell are identical with those shown on broadcast television stations (A. 286a, E-179-181, E-236-241). Television "viewers" do not sell commercials.

Teleprompter viewed itself as an advertising medium which would enable advertisers to reach local and specialized audiences as well as national markets by means of cable station networks (A. E-78-80, E-140-142). It freely admitted that it was competing with television stations for the advertising dollar (E-549, E-553, E-556-557). To the FCC it predicted that by 1974 its cable television stations would be carrying $2,000,000 worth of its own national and local avertising annually (E. 589-590).[30]

It was on the basis of these facts that experienced broadcasters testified that the use of commercials by cable stations made them functionally equivalent to broadcasting stations (A. 298a-299a, 378a, 387a, 401a, 407a).[31]

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[30]By 1972, the New York City Teleprompter station alone was carrying some $300,000 of advertising. See *Broadcasting*, October 29, 1973 at 28, 30. As noted at 10 *supra*, Teleprompter's New York City station is also currently providing a "classified ad service".

[31]The District Court below (A. 126a-127a), although not the Court of Appeals, disregarded Teleprompter's activities in the sale of commercials on the ground that at present such activities were "small". However, the issue was raised as a test issue and such a conclusion was accordingly irrelevant and merely invited further litigation. One reason why more evidence was not adduced was that plaintiffs simplified the issues at trial by limiting their proof to five illustrative systems. Secondly, the decision of cable stations to sell advertising was a relatively new policy adopted by Teleprompter in response to proliferation of origination and importation functions (A. 576a-577a). See *infra* at 31. Teleprompter's activities since trial indicate that its sale of commercials is not an insignificant feature of its business. See *supra* at 11, 26n. 30.

3. Interconnection.

A prime function of a broadcast television network affiliate station is to act as the local outlet for the simultaneous interconnected network retransmission of programs originated at a single central source. The primitive CATV systems involved in *Fortnightly* did not have the capacity to form part of an interconnecting cable network and did not do so. However, the national Teleprompter system clearly had the capability to do so, the intention to do so, and in fact did so using its own stations as well as non-Teleprompter cable stations (A. 258a-259a, 280a, E-30, E-34).

This obviously is not the activity of a "passive beneficiary" or of a television "viewer," and it led experienced broadcasters to testify that the Teleprompter cable stations were functionally equivalent to network affiliated stations (A. 298a-299a, 378a, 401a, 407a, 411a).

As was the case with the District Court's approach to the sale of advertising, *supra* at 26n. 31, both the Court of Appeals and the District Court chose to disregard Teleprompter's networking activities on the ground, *inter alia*, that only a few instances of interconnection were involved.[33] Both courts felt that it was not necessary to consider "what this may portend for the future" (A. xxx-xxxi, 125a).

Such a stance, however, merely invites further litigation. One reason that there were relatively few examples

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[33]The District Court and the Court of Appeals erroneously singled out only two or three examples of interconnection by Teleprompter. There were, however, numerous other examples in the record. For example, Teleprompter telecast over a cable network The Daytona 500, a major sporting event, for five successive years. Furthermore, it interconnected with other stations to originate election results and to deliver programming. The interconnection system in New York City is on and operating (A. 507a, E-30).

of interconnection in the record is that Petitioners' proof was presented with respect to only five illustrative systems in order to expedite pre-trial proceedings and the trial itself.

Notwithstanding such limitation, however, the record contains ample evidence that extensive interconnection is not merely a gleam in Teleprompter's eye for the distant future. It has played an integral part in Teleprompter's past actions and in its planning for the future. The permanent implementation of this network was one of its aims in acquiring a corporation which produces television programs (A. 602a, E-575-577). In 1970 Teleprompter merged with H & B American to form the nation's largest cable television company; an acknowledged purpose of this merger was to acquire more outlets for a national cable television network (E-38, E-93, E-212, E-572-573). The very next year, as an avowed step towards the establishment of the already planned network, Teleprompter filed with the FCC an application to own and operate receiving stations for a domestic communications satellite (E-29). Plans for such a national satellite connected cable television network are proceeding apace.[83] As noted above, Teleprompter recently began production of a cable network news program transmitted by more than 25 interconnected cable stations with 500,000 subscribers in New York, New Jersey and Pennsylvania.[84]

The evidence on record clearly shows that Teleprompter is currently expanding its national cable station network activity (J. A. 602a, E-22). To the FCC it represented that by this year its cable stations as well as 100 independent stations would be receiving from it a network package (E-575-576, E-589). This is not the boast of a "passive beneficiary" with no more than dreams for its future.

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[83] See *Broadcasting*, March 19, 1973 at 114-116.
[84] See *Broadcasting*, October 1, 1973 at 5.

B. All of the functions performed by the Teleprompter cable television stations here at issue are integral parts of the total operations of those stations and under the *Fortnightly* test must be analyzed as such. The sum of these functions is precisely the sum of a broadcaster's functions and under the *Fortnightly* test must be treated as such.

As noted above, the various new operations performed by the Teleprompter cable television stations are precisely the functions recognized by this Court in *Fortnightly* as functions of traditional broadcast stations. Moreover, the record is clear that these new services were offered by the Teleprompter stations to the public in "combination" with the traditional reception services. None of the services was sold in "isolation" (A. 136a). Both of the Courts below correctly stated that the Teleprompter systems "sell one basic service" (A. 121a); that the various services were advertised and sold to the public "as a package"; that nobody bought or could buy any one service "without the other" (A. xxviii, 135a).

All of Teleprompter's activities in program origination had a clear and basic purpose: origination was to become the "showcase" to attract new subscribers for all of the Teleprompter stations and it succeeded in so doing (A. 531a, 601a-603a, E-134). Advertising policy was drastically changed to emphasize the origination function and Teleprompter proudly called attention to this new function in newspaper advertisements and promotions (A. 575a-576a, E-163-164, E-171-172, E-193, E-194-208, E-223).

Similarly, the importation of distant signals was heavily advertised with the acknowledged purpose and effect of attracting new subscribers to the Teleprompter cable television stations and, thus, enlarged the audience for Teleprompter's originated programming and commercials

(E-234; see A. 540a, E-215, E-216, E-218, E-219, E-224-226, E-228, E-284).

Teleprompter also viewed the sale of commercials as an integral part of its total operations. It deemed the sale of commercials as essential for offering the public a "wider choice of programming" (E-54-55).

It is equally clear that Teleprompter did not regard interconnection as an "isolated" function. It too was an integral part of its efforts to attract new subscribers to the entire Teleprompter "package". Just as with program origination, Teleprompter extensively advertised its interconnection function (A. 567a, E-230, E-231, E-233).

In its advertising Teleprompter linked origination, importation of distant signals, and interconnection (A. 120a-121a). It often did this in the same copy.[35] At the same time, it sold commercials to help finance these new functions. The purpose of all this was to attract subscribers to the "package" of services Teleprompter was selling as a unit (A. 120a-121a, 525a-526a, 561a-562a, 565a-567a). And these new functions did succeed in increasing the number of subscribers to and the revenues of the various Teleprompter cable television stations (A. 525a-526a, 601a, E-134, E-192, E-224-226, E-234). Teleprompter, of course, was able to devote its energies and monies to program origination and interconnection in competition with broadcasters because it was receiving and retransmitting without payment programs for which broadcasters must and do pay copyright.

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[35] See, *e.g.*, E-222:

"Cable TV brings you fresh TV signals and more channels. Including special channels for weather, stock prices, educational shows and closed circuit sport specials. It brings you more great old movies and recent hits, a spectacular variety of sports and a barrage of new programs. In crisp, clear color and black and white."

Teleprompter's advertising policies reflected the economic realities because all of their subscribers receive the totality of the services offered (A. 121a, 135a-136a). No one can buy the Teleprompter program origination service from a broadcast importing cable television station without also buying the imported distant signals service, just as no viewer can receive the local program originations of a network affiliated television broadcast station without also receiving the signals imported from the distant network centers, signals which constitute the backbone of an affiliate's programming. Yet notwithstanding the foregoing, the courts below ignored the *Fortnightly* "total operations" principle and proceeded to analyze each of the combined services in "isolation".

The District Court isolated Teleprompter's program origination function on the ground that it was somehow an "unrelated function," like the offer of "free ice cream or candy to every subscriber" (A. 135a-136a). Origination, however, is not an "unrelated function" to Teleprompter, any more than it is to any broadcaster. It is part of the total package made available to subscribers and part of the total package subscribers expect to receive from Teleprompter.

Similarly, the Court of Appeals improperly applied the *Fortnightly* "total operations" principle. It considered the new functions here at issue as separate and unrelated, rather than as integral parts of a whole, for the sole reason that they were provided by Teleprompter, at Teleprompter's choice, on channels separate from the channels used for retransmission of broadcast station programming. Such an artificial segmentation of the various functions included within the service package provided by Teleprompter to its subscribers, however, does not reflect the logic or economic realities of either the cable television or broadcasting industries.

The artificiality of this approach is emphasized by the Court's suggestion that a different result might have been appropriate if the Teleprompter originated programming had physically replaced the retransmitted broadcast programming on a single channel, or if the Teleprompter-sold commercials had been substituted for the commercials embodied in the broadcast programming distributed by the cable stations[38], or if cable station interconnection had occurred with respect to broadcast programming (A. xxvii-xxviii, xxx-xxxi).

With due respect, Petitioners cannot believe that under this Court's *Fortnightly* rule the question of the overall function of a cable television station for copyright purposes can turn on the number of channels utilized at its option by a cable television station. After all, a circus is functionally a circus whether it has one ring as in the case of the traditional European circus, or three rings, as in the case of the traditional American circus. Just as the American spectator can freely change the object of his attention from the center ring to one of the side rings, a Teleprompter subscriber can freely switch from one channel to another to receive his choice of Teleprompter offered programming.

The Court of Appeals' distinction, that separate channels are involved, ignores the reality that Teleprompter sells a total service for a single price. All the functions here at issue are a part of the service. In the past, the courts have refused to split up various related activities having the same object in order to afford copyright immunity. For

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[38]It might be noted that there is no technical disability to inhibit cable television stations from substituting their own commercials for those broadcast in the first instance by the television stations whose signals are being retransmitted. Indeed, Canadian cable television stations are doing just that with respect to the commercials on the American border stations' signals that they retransmit. See *Broadcasting*, July 23, 1973 at 40; October 15, 1973 at 3; and October 22, 1973 at 34.

example, in *Herbert* v. *Shanley*, 242 U. S. 591 (1917) (Holmes, J.), the Supreme Court rejected the argument that, since there was no charge in a restaurant for the performance of music, it was not a performance for profit. It pointed out, among other things, that "[p]erformances not different in kind from those of the defendant's could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiff to have. * * * They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important." *Id.* at 594. See *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944).

In the instant case, it would ignore reality to assume that cable subscribers view what they are receiving as being in distinct niches. The cable subscriber pays for the spectrum of services and programs that a cable television station furnishes, regardless of channel; and its makes no difference to him whether or not these services and programs are on the same or separate channels.

A business entity such as Teleprompter, which redistributes television programming originated by others, originates its own programming, sells commercials, and interconnects into networks does precisely what a broadcast television network-affiliated station does. Such a business entity performs precisely those functions identified by this Court in *Fortnightly* as the functions of a "broadcaster." Copyright immunity should not be extended to such an entity.

CONCLUSION

The judgment of the Court of Appeals should be reversed insofar as it affirms in part the judgment of the District Court.

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